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IN THE

Supreme Court of the United States

October Term, 1967

No. 237

ARCHIE NATHANIEL BIGGERS,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

REPLY BRIEF FOR PETITIONER

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By leave of Court, respondent has filed a Supplemental Brief. Pursuant to Rule 41(3), petitioner files this brief in reply.

1. Respondent contends that Mrs. Beamer, in addition to testifying at length as to her out-of-court identification, identified petitioner in the courtroom. This is true, says respondent because she spoke of the "defendant" and "There was but one defendant in the courtroom" (Supp. Br. p. 3).

Such a contention fundamentally misconceives the character of physical identification. The act of identification is not a matter of speaking a name or knowing a status. Rather it is locating a particular physical presence, a body, among other physical presences. It is no accident that the standard means of identification in the courtroom em-

ployed by trial lawyers is to ask a witness whether the person to be identified is present in the courtroom and, if so, to point him out. Although represented by experienced counsel, the state failed to follow the standard procedure in this case. Mrs. Beamer was never asked to locate Mr. Biggers or the "defendant" in the courtroom.

There are important policy reasons, moreover, why a courtroom identification should not be inferred. It would be unwise to reduce the extent to which a witness must commit himself or herself in locating the person named the criminal, for reasonable explicitness in pointing out the person identified makes the witness expressly responsible for his or her judgment. This sense of personal responsibility enhances the degree of caution a witness will exercise in making a decision which involves a grave potential for prejudice.

Of course, even if the record in this case did establish an in-court identification, petitioner's conviction would still have to be set aside by reason of the fact that the major portion of Mrs. Beamer's testimony was a description of her tainted pre-trial identification, see *Gilbert* v. *California*, 388 U.S. 263, 272-73 (1967).

2. Respondent appears to believe that petitioner contends Mrs. Beamer did not identify him until his picture appeared in the *Nashville Tennessean* on the morning of August 18, 1965. Petitioner makes no such claim. What he does urge as a factor to be considered in appraising the totality of circumstances is that Mrs. Beamer may have been influenced by a story in the previous day's *Tennessean*, August 17, 1965 describing the arrest of a Negro youth who would be questioned about a series of rapes (R. 196; Pet. Br., p. 14, n. 12) and, more signif-

icantly, that a factor contributing to the fundamental unfairness of the proceedings below was the state's totally unwarranted and prejudicial interjection of the existence of the August 18, 1965, newspaper photograph.

At the beginning of the trial, the prosecuting attorney, over objection, asked Mrs. Beamer whether she had identified Biggers "before or after something appeared in the newspaper" (R. 17). She answered

> "It was before the picture was published, the next morning."

The record reveals that it took some three or four days to select a jury in this case in part because several jurors had seen newspaper stories about Biggers (R. 58, 59, 175). Thus, the state's initial reference to the newspaper photograph presented a dilemma for petitioner's trial counsel. They could let the reference go unexplained and hope that the jury would disregard it, or they could attempt to test the credibility of Mrs. Beamer's testimony. In either event the foreign and prejudicial element had been placed before the trial jury. Counsel attempted the latter course with the result that, while one police officer was uncertain whether the picture appeared prior to or subsequent to the identification, the state introduced cumulative testimony to establish that the identification took place prior to the day the photograph appeared in the newspaper (R. 47, 66, 97-103; cf. 182). This testimony detracted from the fairness of trial not only because it was irrelevant to the question of guilt but because it was calculated to arouse juror's memories of newspaper accounts and photographs describing Biggers as a confessed rapist, making impossible any objective assessment of Mrs. Beamer's identification testimony. Thus, by bringing up the matter of the

photograph, the state significantly impaired the integrity of the guilt finding process.

3. The Supplemental Brief asserts that Mrs. Beamer "had looked at suspects and photographs of suspects for a period of nearly seven months and had made no erroneous identification of any of them" (p. 5). The record, however, is totally silent with respect to times, dates, character and circumstances of Mrs. Beamer's viewing of photographs and suspects. Such viewings may have taken place within a day or week of the crime. They may have been line-ups or show-ups. Rogues gallery photographs may have been employed. Pictures may have been presented individually or in groups. Suggestion may have been directed to her or the viewings may have been arranged with scrupulous regard for fairness. To the extent the highly unreliable procedures employed in presenting petitioner to Mrs. Beamer seven months after the crime are sought to be explained away by the supposed reliability of Mrs. Beamer's failure to identify anyone prior to August, it is respondent's burden to show the facts and circumstances which make reliable an otherwise unreliable manner of proceeding, *Cf. United States* v. *Wade*, 388 U.S. 218, 240, n. 31, 241 (1967). Otherwise petitioner would be presented with an impossible task of negating any factor possibly enhancing reliability where the proof of such factors, if they exist, is within the exclusive knowledge of the state. Whatever its potential application to some other case, it does not serve the state well here to assert that "exhibiting suspects to a witness separately over a long period of time could very well be a greater safety measure for a not guilty person than placing them all in one line on one occasion" because the state never proved that suspects were exhibited to Mrs. Beamer "over a long period of time" (Supp. Br. p. 5).

The state also contends that "An investigation extending over several months cannot as a practical matter be done with all the safeguards and finesse that may be employed when only one 'hot' prospect and one investigation is involved" (Supp. Br. p. 7). This assertion is likewise unsupported by the record. A lineup was not difficult or even inconvenient to arrange. The identification took place at police headquarters; Biggers was brought there from a juvenile detention facility. There was no shortage of persons to compose a lineup. The many other police failures to safeguard the fairness of the identification proceeding were equally unnecessary, see Pet. Br. pp. 17, 18.[1]

4. The Supplemental Brief asserts (p. 6) that Mrs. Beamer's identification was reliable, although she had a "limited opportunity" to see the petitioner before the crime, because there was a "lack of any discrepancy between her description of him and his actual appearance." This statement erroneously suggests that Mrs. Beamer gave a detailed description of the assailant at the time of her arrest, that such description matched the features of petitioner, and that similarity between the original description and Biggers' appearance bolsters the reliability of Mrs. Beamer's identification. The only problem with this reasoning is that the state never showed the character of any description Mrs. Beamer gave to the police at the time of the crime. At trial, she was asked which characteristics of petitioner enabled her to identify him at the pre-trial identification, but she never testified, nor did any police officer, that she had given any particular descrip-

[1] In addition, the state seems to be saying that where there is evidence tying a suspect to a crime procedural safeguards will be followed but where the evidence is slight and no "hot" prospect is involved safeguards should be abandoned. Such a rule is calculated to convict the innocent because it maximizes suggestion in the case where evidence of guilt is slightest.

tion at the time she reported the crime, or shortly thereafter.

In fact, the only reference in the record to such a description hardly gives one a feeling of great confidence in Mrs. Beamer's ability to observe precisely during the crime (and the state now concedes her opportunity to observe was "limited" (Supp. Br. p. 6)). One of the officers initially assigned to the case was asked "what if anything else did you do in the course of your investigation." He answered: "We had the plaintiff go to the homicide office and give a statement as to what happened and also we got a description as best she could describe the subject and it was taken down. . ." (R. 50). Thus Mrs. Beamer gave a description characterized "as best she could." This description was "taken down" by the police but was never offered at trial to bolster Mrs. Beamer's reliability. Under established principles, the character of the description she gave must be deemed to have hindered rather than helped the state's case for Mrs. Beamer's reliability.

5. Finally, the state finds moment in the fact that Mrs. Beamer "exhibited an attitude of coolness and clearness of mind" (Supp. Br. p. 5) at the out-of-court identification. But it would be surprising indeed if she were not relatively less emotional seven months after the offense. On the other hand, as the state concedes, such coolness was not possible on January 22, 1967 "due to her being emotionally upset at the time or immediately after the incident occurred" (Supp. Br. p. 5). It was, however, at the time the incident occurred that the original perception upon which recollection is based took place. If the initial opportunity to observe was "limited" and the witness "emotionally upset," a seven month subsequent identification,

rendered under the influence of suggestion from the police, is not rendered reliable because emotions have cooled.

Respectfully submitted,

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